No. 84-89

IN THE

Supreme Court of the United States

October Term, 1984

JOHNSON & JOHNSON,

Petitioner,

vs.

STANLEY McDONALD, NORMAN R. HAGFORS, and CLAYTON JENSEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

Table of Authorities ii

Introduction 2

Statement of the Case 3

Argument 14

J&J's Petition, Which Seeks To Have This Court Review The Eighth Circuit's Exercise Of Its Discretion In Deciding Issues Of Minnesota Fraud And Contract Law, Presents No Question Of Constitutional Law, No Issue On Which The Circuits Are Split, And No Important And Unsettled Question Of Law For This Court's Determination 14

A. The Eighth Circuit's Decision Presents No Constitutional Question, Conflict With Other Circuits, Or Decision On An Important Unsettled Question 14

B. The Eighth Circuit Recognized And Correctly Applied The Proper Law In Accordance With This Court's Decisions 19

C. J&J Received A Fair Trial, And Its Claims To The Contrary Provide No Basis For Granting Certiorari 25

Conclusion 27

TABLE OF AUTHORITIES

Page

Cases:

Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983) 4

Bruton v. United States, 391 U.S. 123 (1968) 26

Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494 (1931) 2, 3, 6, 15, 16, 17, 19, 20

Lutwak v. United States, 344 U.S. 604 (1953) 26

Minneapolis & St. Louis R. Co. v. Winters, 242 U.S. 353 (1917) 26

Minneapolis, St.P. & S.S.M. Ry. v. Moquin, 283 U.S. 520 (1931) 16

Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911) 12

United States v. American Tobacco Co., 221 U.S. 106 (1911) 12

United States v. Swift & Co., 286 U.S. 106 (1932) 12

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971) 26

Federal:

Camalier and Buckley-Madison, Inc. v. Madison Hotel, Inc., 513 F.2d 407 (D.C.Cir. 1975) 23

Devine v. Patteson, 242 F.2d 828 (6th Cir. 1957), *cert. denied*, 355 U.S. 821 (1957) 24

Great Coastal Express, Inc. v. International Brotherhood of Teamsters, 511 F.2d 839 (4th Cir. 1975), *cert. denied*, 425 U.S. 975 (1976) 16, 24

Hadra v. Herman Blum Consulting Engineers, 632 F.2d 1242 (5th Cir. 1980), *cert. denied*, 451 U.S. 912 (1981) 24

Page

Hatfield v. Seaboard Air Line Railroad Co.,
396 F.2d 721 (5th Cir. 1968) 23

Jamison Company, Inc. v. Westvaco Corp.,
526 F.2d 922 (5th Cir. 1976) 23

MCI Communications Corporation v. American Telephone and Telegraph Co., 708 F.2d 1081 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 234 (1983) 24

McDonald v. Johnson & Johnson,
722 F.2d 1370 (8th Cir. 1983) 2, 4

McDonald v. Johnson & Johnson, 537 F.Supp. 1282 (D.Minn. 1982), *aff'd in part, rev'd in part*,
722 F.2d 1370 (8th Cir. 1983) 2, 4

Mertens v. Flying Tiger Line, Inc.,
341 F.2d 851 (2d Cir. 1965), *cert. denied*,
382 U.S. 816 (1965) 24

Miller v. Tennessee Gas Transmission Co.,
220 F.2d 434 (5th Cir. 1955) 24

Mueller v. Hubbard Milling Co.,
573 F.2d 1029 (8th Cir. 1978), *cert. denied*,
439 U.S. 865 (1978) 16

Schuerholz v. Roach,
58 F.2d 32 (4th Cir. 1982), *cert. denied*,
287 U.S. 623 (1932) 24

Taylor v. Denver and Rio Grande Western Railroad Co., 438 F.2d 351 (10th Cir. 1971) 24

Thompson v. Camp,
167 F.2d 733 (6th Cir. 1948), *cert. denied*,
335 U.S. 824 (1948) 24

Vizzini v. Ford Motor Co.,
569 F.2d 754 (3rd Cir. 1977) 23

Statutes:

Sherman Act, Section 1, 15 U.S.C. §1 (1982) 3, 5, 18

Sherman Act, Section 2, 15 U.S.C. §2 (1982) 3, 5

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INTRODUCTION

Respondents above named ("plaintiffs") submit this brief in opposition to the petition of Johnson & Johnson ("J&J") for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit affirming a breach of contract judgment obtained by the plaintiffs against J&J. *McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1388-89 (8th Cir. 1983), affirming and vacating in part 537 F.Supp. 1282 (D.Minn. 1982).

In essence, J&J is asking this Court to review a decision affirming a judgment for breach of contract under state law, as well as to review the Eighth Circuit's exercise of its discretion in deciding not to order a new trial of the contract claim while requiring a new trial of a companion fraud claim. Such a decision applying state law involves no constitutional question, does not create any conflict between the Eighth Circuit and any other federal circuit, contravenes no decision of this Court, and presents no important and doubtful question this Court ought to resolve.

In its petition, J&J presents absolutely no authority tending to show that the questions it presents are at all appropriate for determination by this Court. Since *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), the case on which J&J principally relies, decided more than fifty years ago, there is not a single Supreme Court decision cited by J&J in which this Court has granted certiorari to consider an issue even remotely similar to the question J&J attempts to present here. Indeed, the opinion in the *Gasoline Products* case is sufficiently contrary to J&J's position that a grant of certiorari in response to J&J's petition is totally unwarranted. Rather than requiring a new trial of the contract judgment,

the *Gasoline Products* case shows that the Eighth Circuit was in no way bound to grant a new trial on the contract claim, and was clearly correct in not doing so.

STATEMENT OF THE CASE

This is a cross-petition in a case tried in the United States District Court for the District of Minnesota and appealed to the United States Court of Appeals for the Eighth Circuit. The plaintiffs are three inventors and entrepreneurs who claim that J&J acquired their business ("StimTech") in 1975 for the purpose of suppressing the business, its products, and the competition of plaintiffs personally. The primary product of the plaintiffs' business was a transcutaneous electrical nerve stimulator ("TENS" device), a safe and effective electronic cure for pain, which would have competed with J&J's pain control drugs, such as Tylenol. The plaintiffs alleged that J&J induced them to enter into acquisition and employment agreements through fraudulent representations that J&J would help the plaintiffs develop and promote their business; that J&J breached the acquisition agreement by willfully and in bad faith suppressing their business after the acquisition; and that the entire course of conduct—acquiring the plaintiffs' business for the purpose of suppression—constituted a violation of the antitrust laws. After a five month trial, the jury returned a verdict substantially in the plaintiffs' favor. The jury found that J&J had breached the acquisition agreement and that the plaintiffs' damages were $5.7 million; that J&J had committed fraud and that the plaintiffs' actual damages were $6,275,000.00, to which the jury added punitive damages of $25 million; and that J&J had violated Sections 1 and 2 of the Sherman Act, and that

for each violation the plaintiffs' damages were $56.8 million, which the trial court trebled to $170.4 million. The trial court entered alternative judgments on the verdict, the largest being $170.4 million for the antitrust violations. In a lengthy opinion, the trial court denied J&J's post-trial motions in all respects. *McDonald v. Johnson & Johnson*, 527 F.Supp. 1282 (D.Minn. 1982).

J&J appealed to the Eighth Circuit, which, in a two-to-one decision, affirmed in part and vacated and remanded in part. *McDonald v. Johnson & Johnson*, 722 F.2d 1370 (8th Cir. 1983).

In the majority opinion, Chief Judge Lay, joined by Judge Fagg, held that under this Court's decision in *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), the plaintiffs lacked standing to maintain their antitrust claims, on the ground, *inter alia*, that the plaintiffs had voluntarily withdrawn from the TENS industry when they entered into the acquisition agreement with J&J. The fraud verdict and actual damages for fraud were affirmed by the majority, which found the verdict and damage award to be in accordance with both the evidence and the law. The majority reversed, however, the punitive damage award for fraud on the ground that the plaintiffs had impermissibly asked the jury in closing argument to award punitive damages based upon J&J's suppression of the plaintiffs' pain control business, conduct the majority found to be related to the claimed antitrust violation and not to the fraud. Accordingly, the majority ordered a remand for a new trial limited to the fraud punitive damages alone. 722 F.2d at 1370-83.

Dissenting in part and concurring in part, Judge Heaney found that the plaintiffs had standing to maintain their antitrust claims; and that, although the plaintiffs had not proved

a *per se* violation of Section 1 or a violation of Section 2 of the Sherman Act, there was sufficient evidence to find a violation of Section 1 under the rule of reason. Judge Heaney would have remanded for a new trial of the antitrust claim under the rule of reason. On the fraud judgment, Judge Heaney concurred with the majority's affirmance of the finding of fraud and the award of actual damages. He would have affirmed, however, the award of punitive damages, inasmuch as he found the plaintiffs' closing argument to be in no way improper, and the amount of punitive damages to be supported by law. 722 F.2d at 1383-88.

Judge Heaney concluded his dissent with an impassioned plea that courts not foreclose plaintiffs from bringing actions such as this under the antitrust laws:

> "*We cannot continue to dilute our antitrust laws.* They should be vigorously enforced to ensure a competitive economy in which new products are freely and fully developed. While we should not discourage large companies from acquiring smaller ones for the purpose of developing the products of the smaller company, we cannot permit a company that is dominant in a relevant market to acquire a smaller company that has perfected a competing product with an intent to suppress that product and then carry out that intent. *Such conduct is clearly in violation of the antitrust laws.*" 722 F.2d at 1388 (emphasis added).

Thereafter, both parties petitioned for rehearing and rehearing en banc. The Court denied the plaintiffs' petition, but granted J&J's petition in part and modified the Court's previous opinion, again by a two-to-one decision, Judge Heaney

dissenting. On rehearing, the majority held, pursuant to *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), that it could not order a new trial solely on punitive damages for fraud, because issues of punitive damages and liability were not sufficiently distinct and separable to permit a retrial without prejudice. The majority therefore ordered a new trial of the entire fraud claim. 722 F.2d at 1388-89.

The majority then reviewed the plaintiffs' judgment for breach of contract, which it had not previously considered, and affirmed that judgment in all respects. The majority found that the parties had entered into a contract requiring J&J to make a good faith effort to promote the plaintiffs' business after the acquisition, and that there was sufficient evidence to establish that J&J had, *in bad faith*, breached this undertaking. The Court held that the parole evidence rule did not bar the plaintiffs from introducing evidence of representations made by J&J during the negotiations, in order to establish the meaning and terms of the agreement between the parties. J&J at no time challenged the amount of the damage award, $5.7 million, which the majority affirmed. 722 F.2d at 1389. In dissent, Judge Heaney adhered to his original opinion affirming the fraud judgment *in toto* and remanding the antitrust claims for a new trial under the rule of reason. *Ibid.*

J&J thereafter filed a second petition for rehearing, urging that *Gasoline Products, supra*, did not permit a retrial of the fraud claim without a retrial of the contract claim, because the contract and fraud issues were not sufficiently distinct and separable to permit a retrial of the fraud claim alone without prejudice. The Eighth Circuit denied J&J's petition on February 28, 1984.

On April 10, 1984, the plaintiffs filed a petition for certiorari asking this court to review the plaintiffs' antitrust

standing, suppression as an antitrust violation, the jury's award of antitrust damages, and the reversal of the punitive damage award for fraud. (Petition for Certiorari, No. 83-1659.) On July 16, 1984, after obtaining an extension, J&J filed this cross-petition.

The plaintiffs have carefully and objectively described the proceedings below, so that this Court will have an accurate picture of exactly what was and was not decided in this case to date. The reason plaintiffs have done so is that J&J has not presented a truthful and candid account of the decisions and record below. Rather, J&J has devoted more than half its petition to an effort to reargue the evidence and the record in proceedings below. These are the very same efforts J&J made unsuccessfully to the jury, the trial court, and the Eighth Circuit, all of whom found the facts to be essentially as established by the plaintiffs' evidence.

Although it would serve no purpose for plaintiffs to respond to every inaccuracy in J&J's petition, there are certain glaring errors in the petition to which plaintiffs believe they should respond in order for this Court to have a full appreciation of the true course of proceedings and the record below.

Specifically, J&J's petition contains the following material misstatements concerning proceedings below:

(1) *J&J's Statements That The Eighth Circuit Found That The "Prejudicial" Antitrust Theory "Polluted" The Entire Case:*

In the first place, the Court of Appeals did not find that the plaintiffs' antitrust theory—that acquiring to suppress violates the antitrust laws—was unfounded or contrary to law. Rather, what the Eighth Circuit majority found was that the plaintiffs had no standing to maintain such a claim. Second,

and more importantly, the majority in no sense found that the "prejudicial" antitrust theory "polluted" the entire case. To the contrary, the majority held only that the plaintiffs did not make a proper jury argument *on the issue of punitive damages for fraud alone,* when the plaintiffs asked the jury to award punitive damages based on J&J's suppression, which, according to the majority, went to the antitrust claims plaintiffs had no standing to maintain. Thus, the only way in which the majority found the suppression to have been improperly used or argued was in connection with the award of punitive damages for fraud. Indeed, in affirming the contract claim, the majority necessarily found that there was no improper use of the suppression theory, or taint resulting therefrom. Of course, there could be no such taint or improper use, inasmuch as suppression of the plaintiffs' business after the acquisition would clearly be a bad faith violation of the acquisition agreement, which required J&J to use good faith and reasonable efforts to promote the plaintiffs' business.

(2) *J&J's Contention That The Acquisition Agreement Required J&J Only To Use "Reasonable Business Judgment":*

The operative language of the agreement appears at 722 F.2d at 1389 and provides:

> "Stockholders [plaintiffs] and Johnson & Johnson recognize and acknowledge that the relationship which will exist between Johnson & Johnson, the Company [StimTech] and the Stockholders upon consummation of the transactions contemplated herein, must be based on a high degree of mutual trust and confidence by the Company, Stockholders and Johnson & Johnson. Stockholders

> and Johnson & Johnson agree that each will at all times act in respect to its dealings with the Company and its operations, and subject to its dealings with the Company and its operations, and subject to the exercise of reasonable business judgment, act [sic] in such a way as to promote to the extent reasonably possible the successful operation and growth of the Company."

Obviously, the foregoing language involves much more than reasonable business judgment, inasmuch as it acknowledges a relationship "based on a high degree of mutual trust and confidence," and requires J&J, as well as the plaintiffs, to "act in such a way as to promote to the extent reasonably possible the successful operation and growth of the Company." J&J's deliberate mischaracterization of this undisputed evidence is, however, indicative of J&J's approach to the entire record and course of proceedings below.

(3) *J&J's Alleged "Investment" In The Plaintiffs' Business And The Increase Of The Business' Sales:*

With respect to J&J's claim that it invested substantial amounts in the plaintiffs' business after the acquisition, the trial court found this "investment" to be largely illusory, "in the nature of paying past due bills and covering deficits resulting from sales shortfall so as to keep StimTech out of bankruptcy." 537 F.Supp. at 1333. The Court of Appeals did not differ. As to increases in StimTech's sales after the acquisition, StimTech maintained a static position in the industry, never increasing market share, and the TENS industry as a whole remained miniscule in comparison with the overall market, which included pain-killing drugs. 537 F.Supp. 1332-33.

(4) *J&J's Claim That The Lower Courts Permitted Plaintiffs To Recover Contract Damages Simply By Showing J&J Made Promises Guaranteeing The Plaintiffs' Earn-Out:*

Contrary to J&J's assertions, the trial court never permitted the plaintiffs to recover contract damages based simply on proof of oral guarantees of payment by J&J, nor did the Court of Appeals sustain the contract judgment on this basis. Rather, the trial court specifically instructed the jury that for plaintiffs to recover contract damages, they had to show not merely that J&J made promises, but that J&J broke them knowingly and in bad faith—in other words that J&J knowingly and in bad faith prevented StimTech from operating successfully after the acquisition. 537 F.Supp. at 1351; Tr. 12673-74. On appeal, the Eighth Circuit majority proceeded similarly. 722 F.2d at 1389:

> "Both parties agree that to prove a breach of this paragraph requires a showing of bad faith."

For J&J to state otherwise is again to misrepresent the record to this Court.

(5) *J&J's Claim That There Is No Evidence Of Any Intentional Mismanagement Of The Plaintiffs' Business By J&J After The Acquisition:*

The trial court found overwhelming evidence that J&J had engaged in a wide range of activity intended to suppress StimTech's business after the acquisition, 537 F.Supp. at 1333-34; the Eighth Circuit dissent concurred, 722 F.2d at 1386; and

the Eighth Circuit majority expressly found that J&J's conduct after the acquisition amounted to a bad faith breach of J&J's promises to promote the business, 722 F.2d at 1389:

> "As the District Court set forth, the facts relating to J&J's actions subsequent to the 1974 contract could reasonably be construed by the jury to have been taken consciously and in bad faith [citing to 537 F.Supp. at 1349]."

The Eighth Circuit majority also found that the evidence of J&J's mismanagement of plaintiffs' business after the acquisition supported the jury's finding of fraud. 722 F.2d at 1380:

> "Third, J&J urges that the supposed generalized promise to make 'an effort' to promote ST cannot be a basis for the fraud claim and should have been dismissed because (a) the evidence contradicts the alleged promises, (b) even if the promises were made, J&J made the requisite effort . . .
>
> "As to (a) and (b) above, there was sufficient evidence for the jury to find to the contrary [citing to 537 F.Supp. at 1352]." (footnote omitted)

Contrary to J&J's assertions, every tribunal reviewing the evidence in this case has found more than sufficient evidence to support a finding that J&J deliberately suppressed the plaintiffs' business after the acquisition.

(6) *J&J's Assertion That The Trial Court Instructed The Jury That J&J Had An Affirmative Duty To Promote Its Own Product For The Sake Of Competitors:*

A basic mischaracterization repeatedly voiced by J&J is that the plaintiffs' suppression theory, as adopted by the trial court, permitted the jury to find an antitrust violation based on J&J's internal decision not to promote one of its own products. This is simply not so. The plaintiffs never claimed, nor did the trial court charge, that J&J could be liable for suppression because it unilaterally decided not to promote one of its own products, developed internally by J&J. To the contrary, the plaintiffs claim, as embodied in the trial court's charge, has at all times been that a company violates the antitrust laws, not when it decides not to promote one of its own products, but when it goes outside itself to acquire a new product or business *from someone else* for the purpose of suppressing the new product. See, e.g., 537 F.Supp. at 1340. Nor did the trial court ever instruct the jury that it could find a violation of the antitrust laws based on J&J's size and resources alone. Rather, the instruction by the trial court concerning J&J's size and resources conformed in all respects with this Court's applicable decisions. 537 F.Supp. at 1329-31; *United States v. Swift & Co.*, 286 U.S. 106, 116 (1932); *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

(7) *J&J's Claims That It Did Not Receive A Fair Trial:*

In fact, J&J did receive a fair trial, and admitted getting a fair trial. Moreover, J&J admitted getting a fair trial not

once, but four times, the last time even while the jury was deliberating. 537 F.Supp. at 1321; Tr. 324-25, 544-49, 7536, 13215. Indeed, so confident was J&J of victory at trial that it repeatedly told the jury that the case was a simple one; that the jury need not consider the instructions in detail and could decide the case on the seat of its pants; that the jury could return a verdict in an hour or two, despite the five-month length of trial; and that J&J would not complain if the jury came back in an hour, even with a large verdict against J&J. (Tr. 11303-04, 12322-23, 12825-26, 12923, 12965, 13039.) And then, having made these statements, J&J again admitted, during the jury deliberations, that J&J had received a fair trial. (Tr. 13215.) Finally, even in the Eighth Circuit, J&J conceded that it "never on appeal raised a claim of lack of procedural due process or unfairness in the conduct of the trial." (Reply Brief of Appellant, p. 16.)

For J&J to claim that it did not receive a fair trial is not only false, but also contrary to J&J's own repeated admissions throughout the course of proceedings below. J&J can hardly expect this Court to issue a writ of certiorari to come to the assistance of a wealthy and powerful litigant that has repeatedly and expressly admitted getting a fair trial, when the issue raised by the petition is whether J&J received a fair trial.

ARGUMENT

J&J'S PETITION, WHICH SEEKS TO HAVE THIS COURT REVIEW THE EIGHTH CIRCUIT'S EXERCISE OF ITS DISCRETION IN DECIDING ISSUES OF MINNESOTA FRAUD AND CONTRACT LAW, PRESENTS NO QUESTION OF CONSTITUTIONAL LAW, NO ISSUE ON WHICH THE CIRCUITS ARE SPLIT, AND NO IMPORTANT AND UNSETTLED QUESTION OF LAW FOR THIS COURT'S DETERMINATION.

A. The Eighth Circuit's Decision Presents No Constitutional Question, Conflict With Other Circuits, Or Decision On An Important Unsettled Question.

The Eighth Circuit majority in this action, plainly and simply, affirmed a judgment for breach of contract under Minnesota law, and then decided, in the exercise of its discretion, that fraud issues were sufficiently distinct and separable from contract issues so that a new trial could be had on the fraud claim alone without prejudice to J&J. This is what the majority decided, no more, no less. Try as it might, J&J cannot make the decision otherwise.

Nor, from the Eighth Circuit's decision, can J&J present any question of constitutional law, issue on which the Circuits are split, or important and unsettled question of law for this Court's determination.

Indeed, the Eighth Circuit itself recognized the absence of any issue available to J&J that would be appropriate for granting certiorari. Rule 18 of the Rules of the United States Court of Appeals for the Eighth Circuit provides:

> "In civil cases, including agency proceedings, the court may deny a stay of mandate if the question would not

likely be appropriate for determination by the Supreme Court."

When J&J moved for a stay of the Eighth Circuit mandate to prevent the plaintiffs from collecting their contract judgment, the plaintiffs opposed the stay on the ground, *inter alia*, that, pursuant to Rule 18, J&J could present no issue that would likely be appropriate for determination by this Court. The Eighth Circuit agreed, denied the motion, and issued its mandate. J&J then sought again to stay the mandate by filing a motion with Justice Blackmun of this Court. J&J's motion was extensive, setting forth, at length, the reasons J&J believed review by this Court to be appropriate. Justice Blackmun denied the motion the day it was filed.

There is certainly no constitutional question here. Issues of the interpretation of contracts and the application of the parole evidence rule under Minnesota law in no way implicate the Due Process Clause of the Fourteenth Amendment. Nor does the Eighth Circuit's exercise of its discretion in deciding that fraud and contract claims are sufficiently distinct and separable to permit a retrial of the fraud claim alone without prejudice to J&J. *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), the case principally relied upon by J&J, in fact permits a retrial on less than all claims where the court determines that issues are sufficiently distinct and separable to permit a retrial without prejudice. That is exactly what the Eighth Circuit determined in this case. No constitutional right will be in jeopardy if this Court declines to exercise jurisdiction, and refrains from engaging in the extensive review of the record necessary to determine whether the Eighth Circuit may have exceeded the bounds of its discretion.

There is no conflict among the Circuits here. The controlling authority for granting a partial new trial, followed by all the Circuits, is the *Gasoline Products* case, *supra*. That is exactly the authority followed by the Eighth Circuit in this case. J&J attempts to state, as a general rule, that where prejudice infects one part of a verdict, there must be a retrial of all issues, and a partial retrial is impermissible. The law, however, requires only that a retrial be ordered on just those issues that may have been affected by impropriety in the trial, and not those issues in the trial unaffected by prejudicial error. This is the rule followed by the Eighth Circuit in this case, as well as all other Circuits. *E.g., Great Coastal Express, Inc. v. International Brotherhood of Teamsters, etc.*, 511 F.2d 839 (4th Cir. 1975), *cert. denied*, 425 U.S. 975 (1976).

The case cited by J&J in support of its general proposition of law, *Minneapolis, St.P. & S.S.M. Ry. v. Moquin*, 283 U.S. 520 (1931), involved only the question of whether a remittitur was proper in a case under the Federal Employers Liability Act "where the verdict was obtained by appeals to passion and prejudice." *Id.* at 521. All of the other cases cited by J&J at pp. 16-18 of its petition, in an effort to show how the Eighth Circuit has departed from the rule in other Circuits, have no bearing on this case and are in no way inconsistent with the Eighth Circuit's decision. Of the cases cited by J&J, generally all but one involve the question of whether there may properly be a retrial of damage issues without an accompanying retrial of liability. The remaining case, *Mueller v. Hubbard Milling Co.*, 573 F.2d 1029 (8th Cir. 1978), *cert. denied*, 439 U.S. 865 (1978), involves a general verdict returned by a jury instructed on four theories, one of which was erroneous, so that the appellate court could not determine whether the verdict for the plaintiffs rested upon the erroneous theory. Obviously, neither situation is present here. This is

not a case where the Eighth Circuit wrestled with whether there could be a retrial of damages without liability on the contract claim. Nor is it a case where there was a general verdict on all claims. The jury here returned separate verdicts for the breach of contract, fraud, and antitrust claims. There is thus no basis for inferring that the argument on fraud punitive damages infected the verdict on the contract claim.

Indeed, of all the cases cited by J&J, there is not a single one determining that it is improper to retry a fraud claim without also retrying an accompanying breach of contract claim. J&J has thus made, and can make, no showing that the Eighth Circuit in any way deviated from the rule in any other Circuit in not requiring a new trial of the contract claim in this case.

Finally, the Eighth Circuit's decision presents no important or unsettled question for this Court. The law with regard to new trials on fewer than all issues has been settled and clear for over half a century, since this Court decided the *Gasoline Products* case in 1931. J&J can hardly expect this Court to issue a writ of certiorari to review a Circuit Court's application of this commonly applied and well understood decision.

J&J attempts to give its petition an air of importance by framing a question involving the allegedly prejudicial effect of plaintiffs' antitrust claims—although it is far from clear exactly what question J&J has framed. J&J apparently is asking this Court to formulate a rule that joinder of frivolous antitrust claims to common law claims requires a retrial of all common law claims. Merely to state J&J's proposition, for which J&J offers no supporting authority, demonstrates its absurdity. Further, the proposition has no application to this case, inasmuch as the Eighth Circuit majority never found that the plaintiffs' antitrust claims were frivolous or without merit, but held only that the plaintiffs lacked standing to

bring those claims. The seriousness of the plaintiffs' claims, moreover, is readily apparent from the Eighth Circuit dissent, which found both standing and sufficient evidence to establish a rule of reason violation under Section 1 of the Sherman Act.

Nor does J&J invest its petition with importance by referring to and quoting extensively from the amicus brief filed by the Antitrust Division of the Department of Justice in the Eighth Circuit. In its brief, the Antitrust Division took the untenable and unsupported position that the trial court should have entered j.n.o.v. for J&J on the antitrust claims after the jury returned a verdict for J&J on the plaintiffs' Section 7 claim. Significantly, the Antitrust Division took no position with regard to the fraud and contract judgments, except to say that these common law claims provided an adequate remedy to the plaintiffs. More significantly, the Attorneys General of the States of Minnesota, Arkansas, Iowa, Missouri, and South Dakota were sufficiently unimpressed with the Antitrust Division's position, and convinced of the merit of the plaintiffs' case, that they filed an amicus brief in support of the plaintiffs. According to the amicus brief of the Attorneys General:

> "The *Amici* States submit that the Department's theory is economically unsound; will tend to stifle rather than stimulate innovation; is inconsistent with the history and purposes of the Sherman and Clayton Acts; and finally, improperly attempts to remove an entire class of antitrust actions from the consideration of a fact finder. Therefore, the *Amici* States urge that the Department's argument be rejected and the decision of the lower court be affirmed." Brief for the States of Minnesota, Arkansas, Iowa, Missouri, and South Dakota at p. 19.

B. The Eighth Circuit Recognized And Correctly Applied The Proper Law In Accordance With This Court's Decisions.

An equally compelling reason for denying certiorari is that the Eighth Circuit was clearly right in denying a new trial on the contract claim, and there is no reason for this Court to occupy its time with reviewing this decision.

Without question, the Eighth Circuit correctly recognized the controlling authority on this issue to be this Court's decision in *Gasoline Products*, 283 U.S. 494; and, without question, the Eighth Circuit followed and applied that decision in declining to order a new trial on the contract claim. That the Eighth Circuit recognized, followed, and applied *Gasoline Products* is clear from the decision on J&J's first petition for rehearing, where the Court held, directly on the authority of *Gasoline Products*, that issues of liability and punitive damages were so intertwined that the plaintiffs' entire fraud claim would have to be retried, and not just the issue of punitive damages. 722 F.2d at 1388-89. Having based its decision to require retrial of the entire fraud claim on *Gasoline Products*, the Eighth Circuit can hardly be charged with ignoring or failing to follow that decision in ruling on the immediately ensuing second petition for rehearing from J&J seeking a retrial of the contract claim. The Eighth Circuit thus had the *Gasoline Products* case well in mind when it received J&J's second petition for rehearing directed at the contract claim, and there is no reason to believe that the Court was ignorant of that decision or failed to follow it.

Moreover, the *Gasoline Products* case in no way supports J&J's claim that the Eighth Circuit should have ordered a retrial of all issues. To the contrary, *Gasoline Products* sup-

ports the plaintiffs, and conclusively shows that the Eighth Circuit properly decided that a retrial of the contract claim was not required. In *Gasoline Products*, this Court affirmed the appellate court's determination that it was unnecessary to grant a new trial on a plaintiff's judgment for breach of contract even though a new trial was necessary on the defendant's counterclaim for breach of contract because of erroneous instructions on the measure of damages.

> "If, in the present case, the jury has found, in accordance with the applicable legal rules, the amount due to petitioner on the contract for royalties and all the elements fixing its liability on the treating plant contract, there is no constitutional requirement that those issues should again be sent to a jury, merely because the exigencies of the litigation require that a separable issue be tried again. . . . *Here we hold that where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again.*" *Id.* at 498-99 (emphasis added).

Gasoline Products thus permits the Eighth Circuit to order a retrial of the fraud claim without the contract claim where "the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice," and where the retrial can occur "without confusion and uncertainty, which would amount to a denial of a fair trial." *Id.* at 500. Certainly, the Eighth Circuit made such a determination in its affirmance of the breach of contract judgment, and its refusal to order a new trial thereon. And it was right. There is nothing unfair to J&J about having the plaintiffs

prove that J&J fraudulently induced them to sell their business, while not requiring plaintiffs to prove in the same trial that J&J thereafter breached the acquisition agreement. No one will be confused at the fraud retrial if plaintiffs do not also prove a breach of contract case. J&J will suffer no prejudice from defending against a fraud claim and not an additional contract claim. Clearly, the fraud was anterior to the acquisition agreement, while the breach of contract was subsequent; and the issues of the two claims are distinct and separable enough not to require retrial of the contract claim at the same time the fraud claim is retried. Indeed, to do otherwise would be a grave injustice to the plaintiffs, inasmuch as all three Judges in the Eighth Circuit have already found that J&J breached its agreement with the plaintiffs in bad faith; that J&J fraudulently induced the plaintiffs to deal with J&J; and that the evidence supports the jury's award of contract damages and actual damages for fraud.

The Eighth Circuit was further correct in determining that there had been no prejudice with regard to the contract judgment sufficient to require a new trial of that claim. Notwithstanding J&J's claims, there has been no showing by J&J nor any finding by the Eighth Circuit that the plaintiffs obtained their breach of contract judgment by any improper appeal to passion and prejudice. Again, J&J is wrong when it says that the Eighth Circuit found the plaintiffs' suppression theory to be invalid, or that the Eighth Circuit found the suppression theory improperly to have infected and polluted the contract award. Rather, what the Eighth Circuit found was that the plaintiffs lacked standing to bring an antitrust claim based on suppression, and that the plaintiffs improperly argued suppression only in connection with the award of punitive damages for fraud. The Eighth Circuit majority never held that

the plaintiffs had failed to prove suppression, or that their suppression claims were invalid. Rather, the Eighth Circuit majority said only that harm to the public from the suppression was not harm *from J&J's fraud*, and therefore could not provide a basis for an award of punitive damages.

More significantly, in its review of the record, the Eighth Circuit majority presumably found no basis to conclude that there was any improper argument that had in any way affected the jury's verdict for plaintiffs on their breach of contract claim. Indeed, the majority could not have made such a finding, inasmuch as suppression of the plaintiffs' business, if it occurred (and it did), certainly amounted to a bad faith breach of the acquisition agreement with the plaintiffs. Therefore, on the contract claim, there would have been nothing improper in the plaintiffs' arguing J&J's suppression as a breach of contract. Indeed, the Eighth Circuit majority, in affirming the contract judgment, expressly held,

> "As the District Court set forth, the facts relating to J&J's actions subsequent to the 1974 contract could reasonably be construed by the jury to have been taken consciously and in bad faith. *See id.* [537 F.Supp.] at 1349." 722 F.2d at 1389.

The finding of the trial court, approved by the Eighth Circuit, clearly indicates sufficient evidence to establish that J&J suppressed the plaintiffs' business:

> "The facts as outlined above in the discussion of the evidence relating to the defendant's actions subsequent to the 1974 agreement could reasonably be construed by the jury to have been taken consciously and in bad faith.

> Johnson & Johnson acting through Mr. Anderson engaged in what could be seen as a systematic plan to stifle the StimTech business which would have been a violation of the good faith requirement imposed under paragraph 10(a)." 537 F.Supp. at 1349.

There was thus convincing evidence that J&J in fact suppressed StimTech, and rulings by the trial court and Eighth Circuit majority that this conduct amounted to a bad faith breach of the acquisition agreement. There was therefore no impediment to plaintiffs' arguing the suppression in connection with the breach of contract claim, and perforce no prejudice to J&J from any association of the suppression theory with the contract claim.

The correctness of the Eighth Circuit's decision not to order a new trial on the contract claim is further apparent from a review of those situations where partial new trials are and are not warranted. Clearly, this case does not fall within any of the categories where partial new trials are impermissible, since this case does not involve separation of liability and damage issues for retrial, *Hatfield v. Seaboard Air Line Railroad Co.*, 396 F.2d 721 (5th Cir. 1968); jury confusion in the original trial, *Vizzini v. Ford Motor Co.*, 569 F.2d 754 (3d Cir. 1977); a general verdict on multiple claims including an improperly submitted claim, *Jamison Company, Inc. v. Westvaco Corp.*, 526 F.2d 922 (5th Cir. 1976); or a verdict rendered on jury instructions including an improper instruction, such that it is impossible to determine whether the jury acted on the improper instruction, *Camalier and Buckley-Madison, Inc. v. Madison Hotel, Inc.*, 513 F.2d 407 (D.C.Cir. 1975). Rather, this case readily comes within those situations where partial new trials are permitted, such as

where material improperly admitted on one issue could not have affected the jury's determination on other issues, *MCI Communications Corporation v. American Telephone and Telegraph Co.*, 708 F.2d 1081 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 234 (1983); improper jury instructions on one claim have not affected the result on other claims, *Taylor v. Denver and Rio Grande Western Railroad Co.*, 438 F.2d 351 (10th Cir. 1971); there has been a special verdict establishing the defendant's liability on each claim, *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965); or there is substantial evidence to support a jury's finding on an issue, such that retrial of that issue is unwarranted, *Hadra v. Herman Blum Consulting Engineers*, 632 F.2d 1242 (5th Cir. 1980), *cert. denied*, 451 U.S. 912 (1981). Additionally, partial new trials are favored in view of considerations of time, expense, and judicial economy. *Thompson v. Camp*, 167 F.2d 733 (6th Cir. 1948); *Miller v. Tennessee Gas Transmission Co.*, 220 F.2d 434 (5th Cir. 1955); *Devine v. Patteson*, 242 F.2d 828 (6th Cir. 1957), *cert. denied*, 355 U.S. 821 (1957).

Finally, the decision to grant or deny a partial new trial can be reversed only for abuse of discretion. *Great Coastal Express, Inc. v. International Brotherhood of Teamsters, etc.*, 511 F.2d 839 (4th Cir. 1975); *Schuerholz v. Roach*, 58 F.2d 32 (4th Cir. 1932), *cert. denied*, 287 U.S. 623 (1932). Clearly, on the law and the evidence here, there was no abuse of discretion by the Eighth Circuit majority in deciding not to require a new trial of the contract claim.

C. J&J Received A Fair Trial, And Its Claims To The Contrary Provide No Basis For Granting Certiorari.

It is truly incredible that J&J has the effrontery now to couch its arguments in terms of denial of due process and a fair trial in proceedings below, claims that pervade J&J's petition. The Eighth Circuit majority, in its initial decision, reversed the award of punitive damages because of plaintiff's closing argument on that issue, although the argument found to be improper went directly to J&J's motive for the fraud; the objectionable comments took but a few minutes in two days of hotly contested closing argument at the end of a five month trial; and J&J made no objection to the closing argument either at trial or in its post-trial motions. In its decision on J&J's petition for rehearing, the majority then decided that the interrelation of damage and liability issues required retrial of the entire fraud claim. J&J thus obtained retrial of the entire fraud claim on the basis of isolated comments in closing argument to which J&J never objected.

Equally significantly, J&J admitted numerous times during the trial that it had received a fair trial. Incredibly, the last of these admissions came during jury deliberations, *after* closing argument and the allegedly improper comments by plaintiffs' counsel. Then, on appeal, J&J admitted to the Eighth Circuit that it was raising no "claim of lack of procedural due process or unfairness in the conduct of the trial." (Reply Brief of Appellant, p. 16.)

For J&J now to come before this Court and claim a denial of due process and a fair trial gives new meaning to chutzpah and hubris. Effrontery and gall do not even begin to characterize the posture of this litigant's request that this Court issue its writ of certiorari to determine that J&J did not re-

ceive a fair trial and was denied due process, when J&J has repeatedly admitted the contrary in both the trial and appellate courts.

To begin with, if J&J ever had a claim that it was denied due process or a fair trial, it waived that claim both in the District Court and in the Eighth Circuit by the knowing and voluntary admissions of its counsel. *Minneapolis & St. Louis R. Co. v. Winters*, 242 U.S. 353 (1917); *see* concurring opinion of Harlan, J., in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971).

Additionally, there is no reason for this Court not to take J&J at its word, and accept J&J's repeated admissions that it received a fair trial and was raising no claim of lack of procedural due process or unfairness in the conduct of the trial. Once having taken cognizance of these voluntary, numerous, and unambiguous admissions, this Court need proceed no further in considering J&J's petition. There is no need for this Court to expend its time and resources in considering a claim of error from a litigant that has already admitted receiving a fair trial and said it will not claim otherwise. By its own admission, J&J has already received all the justice to which it is entitled, since, as this Court has frequently said, a litigant is entitled only to a fair trial, and not to a perfect one. *E.g.*, *Lutwak v. United States*, 344 U.S. 604 (1953). Indeed, this firmly established principle of law originated and appears most frequently in criminal cases. *E.g.*, *Bruton v. United States*, 391 U.S. 123 (1968). Since a defendant in a criminal case is entitled only to a fair trial and not a perfect trial, when his liberty is at stake and he is afforded all of the safeguards of the system of criminal justice, then, *a fortiori*, a defendant in a civil case, such as J&J, is entitled to no more—which is exactly what J&J has admitted getting.

Accordingly, there can be no basis for this Court's issuance of a writ of certiorari to determine whether J&J has been denied due process or a fair trial, when J&J has told the trial court it received a fair trial, and the Eighth Circuit it received due process. Having told the Eighth Circuit that it was raising "no claim of lack of procedural due process or unfairness in the conduct of the trial," J&J can hardly expect this Court to consider such claims.

CONCLUSION

On the basis of the foregoing arguments and authorities, plaintiffs respectfully request this Court to deny J&J's petition for certiorari.

Dated: July 27, 1984.

Respectfully submitted,

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